

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Developing a Unified Intercarrier
Compensation Regime

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CC Docket No. 01-92

**REPLY COMMENTS OF THE SUPPORTERS OF THE MISSOULA PLAN
ON THE FEDERAL BENCHMARK MECHANISM AMENDMENT**

April 12, 2007

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I. INTRODUCTION AND SUMMARY

The supporters of the Missoula Plan submit this reply to the comments filed in response to the Federal Benchmark Mechanism (“FBM”) proposal.¹ Like other revisions to the Missoula Plan,² the FBM—developed by the Plan’s supporters in conjunction with various state commissions—marks another important step towards complete intercarrier compensation reform. That point is recognized not just by the state commissions that endorse it, but also by a substantial number of the other commenters in this docket. *See* note 22, *infra*.

Any meaningful proposal for such reform must grapple with the “early adopter” problem: the fact that some states have already taken greater steps than others to reduce intrastate access charges, rebalance local rates, and (in some cases) establish explicit state funds. The original version of the Missoula Plan thus included an Early Adopter Fund (“EAF”) to “enable States to recover some of the funding that they have distributed to carriers that have reduced their

¹ Letter from Five State Commissions and the Missoula Plan Supporters to Marlene Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Jan. 30, 2007, revised Feb. 5, 2007) (attaching the “Federal Benchmark Mechanism”). *See also* “Comment Sought on Amendments to the Missoula Plan Intercarrier Compensation Proposal to Incorporate a Federal Benchmark Mechanism,” Public Notice, DA 07-738 (rel. Feb. 16, 2007). The FBM is an amendment to the Missoula Plan for Intercarrier Compensation Reform (the “Missoula Plan” or “Plan”), itself submitted July 24, 2006. Letter from Commissioners Tony Clark, Ray Baum, and Larry Landis, NARUC Task Force on Intercarrier Compensation, to Chairman Kevin Martin, Chairman, FCC, CC Docket No. 01-92 (filed July 24, 2006) (attaching the “Missoula Plan”).

² *See* Comments of the Missoula Plan Supporters, Attachment A at 1, CC Docket No. 01-92 (filed Oct. 25, 2006) (attaching several amendments to the Plan itself “as a result of discussions with the industry and with state commissions and their staffs, to broaden support for the Plan and to clarify and simplify the Plan”); Letter from the Missoula Plan Supporters to Marlene Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Nov. 6, 2006) (proposing an interim phantom traffic proposal to supplement the Missoula Plan’s long-term solution).

intrastate access rates.”³ But as the Plan’s supporters acknowledged,⁴ the EAF did not fully account for the variety of reform measures that early adopter states had already taken.⁵ The Plan supporters remained committed to reaching a more complete solution to this intricate problem and, working closely with state commissions, generated the present proposal.

As discussed below, this consensus proposal is more than reasonable, and it helps to ensure reasonable comparability of rates from state to state, while appropriately solving the early adopter problem. Predictably, however, most opponents of the Missoula Plan oppose the FBM as well. Much of their opposition simply rehashes the same unfounded criticisms that the same opponents have already lobbed at the Plan itself—criticisms that the Plan’s supporters have thoroughly rebutted in their prior submissions.

Even when the critics try to engage the FBM on its own merits, moreover, they make one or both of the following big-picture analytical mistakes. *First*, the critics attack the supposed *size* of the FBM or the Restructure Mechanism (or both the FBM and the RM) on the apparent assumption that such mechanisms inject new costs into the telecommunications industry that consumers must bear for the first time. That is wrong. The FBM and the RM merely cover existing network costs—costs that consumers are paying already through rates that (for example) reflect higher access charges. Thus, when critics attack these funding mechanisms as “burdensome to consumers,” they are really attacking the core premise of any intercarrier compensation reform: the need to shift a greater percentage of cost-recovery from usage-

³ Missoula Plan at 76.

⁴ Missoula Plan at 76 n.27.

⁵ Several state commissions noted this point as well. *See, e.g.*, Comments of the Early Adopter State Commissions at 5-9, CC Docket No. 01-92 (filed Oct. 25, 2006); Comments of Wyoming at 5, CC Docket No. 01-92 (filed Oct. 25, 2006).

sensitive, service-specific carrier charges (which are ultimately passed on to consumers) to non-usage-sensitive, non-service-specific end-user charges. That is a shift that ultimately *benefits* consumers, given the far greater efficiency and stability of the reformed cost-recovery mechanisms. Moreover, as we note below, the critics' estimates of the FBM's size are greatly inflated as a factual matter.

Second, some critics implicitly contend that no early adopter mechanism is necessary at all, apparently assuming that the Commission bears no responsibility to treat states and their residents equitably in the course of implementing national intercarrier compensation reform. That, too, is wrong. If the Commission did *not* account for the vast disparities in the reform measures already undertaken by different states, it would impose grossly disproportionate burdens on the consumers of the states that have undertaken the greatest reform steps to date. The FBM is the only meaningful proposal on the table that enables the Commission to avoid that perverse result.

In the end, no commenter raises serious doubt about the need for a meaningful early adopter mechanism or the basic legitimacy of the FBM's approach. The FBM carefully accounts for a wide variety of different state reforms and balances competing needs and interests. Of course, like the Plan it amends, the FBM may not yet be perfect. Even in its current form, however, the Plan in general and the FBM in particular are a vast improvement over the alternative: federal inaction in the face of an incoherent and rapidly collapsing regulatory regime.

II. ARGUMENT

A. An Early Adopter Mechanism Is an Indispensable Part of National Intercarrier Compensation Reform.

As the Plan's supporters have recognized from the beginning, the Missoula Plan cannot operate fairly unless it accounts for the laudable steps already taken by many state regulators to reform intrastate rate systems.⁶ Those steps have included substantial reductions in intrastate access charges and the establishment of explicit funding mechanisms to preserve universal service and encourage network development.⁷ At substantial political and bureaucratic cost, these "early adopter" states have taken a leadership role in the absence of broad Commission reform, recognizing that they cannot indefinitely rely on high intrastate access rates for purposes of network cost-recovery in the face of technological change and increasing migration from traditional interexchange access services.⁸ Indeed, as Sprint Nextel notes, "[w]hile increasing local service rates (and concomitantly reducing intrastate access rates) can be politically risky and painful, this type of rate rebalancing . . . will generate benefits to consumers and to the economy far in excess of the short-term costs"⁹ We agree wholeheartedly; the early adopters are to be commended.

Unfortunately, without a mechanism like the FBM, any national intercarrier compensation plan would unfairly burden early adopter states precisely because they have taken

⁶ Missoula Plan at 76-77 & n.27.

⁷ FBM at 2-3.

⁸ *See generally* Reply Comments of Missoula Plan Supporters at 19, CC Docket No. 01-92 (filed Oct. 25, 2006).

⁹ Comments of Sprint Nextel at 1-2. *See also* Comments of CTIA at 7 ("Because these rebalanced rates [in the early adopter states] more closely reflect costs, they promote competition, thereby benefiting consumers."); Comments of USTelecom at 5. Unless otherwise indicated, any citation to a party's "Comments" refers to comments filed in CC Docket 01-92, on or around March 19 or 28, 2007.

the lead in regulatory reform. The Missoula Plan unifies most access charges at new national targets, and the RM ensures the stability of the nation's telecommunications infrastructure by giving affected carriers an opportunity to continue covering their network costs despite these access charge reductions.¹⁰ But the early adopter states have already undertaken reform measures that, like the Missoula Plan, reduce access charges in exchange for higher-end user rates or the creation of explicit funds (or both). Thus, without an early adopter solution, the *benefits* of the RM would flow disproportionately to consumers in states that were *not* early adopters of access charge reform, even though the *burden* of paying for the RM would fall on consumers in all states, including early adopter states. The FBM proposed here precludes that perverse result and equitably balances the legitimate interests of consumers in all states.¹¹

Some commenters nonetheless dismiss the need for an early adopter solution. For example, while admitting that “carriers in states that have not yet reduced intrastate access rates stand to receive considerably more dollars from the [RM] than carriers in states that have already reduced intrastate access rates,” Verizon suggests that no early adopter solution of any sort is necessary, since the intrastate reforms are already in effect.¹² Verizon's position on this issue is part and parcel of its more general submission that no comprehensive intercarrier compensation reform is needed in the first place.¹³ Of course, if the Commission were to follow Verizon's suggestion and preserve the regulatory status quo, it would never have to address the early

¹⁰ Missoula Plan at 64-76; *see* Reply Comments of the Missoula Plan Supporters at 21, CC Docket No. 01-92 (filed Feb. 1, 2007).

¹¹ *See* FBM at 2-3.

¹² Comments of Verizon at 4.

¹³ *See* Comments of Verizon at 36, CC Docket No. 01-92 (filed Oct. 25, 2006) (arguing that a “solution” is unnecessary, as carriers only need to be better educated regarding traffic identification).

adopter problem. But if the Commission decides to tackle national reform, it will need to solve the early adopter problem, and the FBM is the only serious proposal for doing so.¹⁴

CTIA contends, in contrast, that the proper solution is not to provide FBM support to states that have taken the lead in universal service reform, but to *deny* any RM revenues to carriers operating in states that have *not* undertaken broad reforms—in short, to eliminate the RM altogether.¹⁵ The problem with this argument is that high intercarrier compensation charges reflect genuine network costs, and those costs must be recovered somehow—either through continued reliance on access charges or instead through efficient, sustainable, neutral, and explicit revenue mechanisms such as increased SLCs and the RM. To the extent that CTIA and other commenters are simply repeating their contention that the RM does not cover actual network costs and is simply a windfall for ILECs,¹⁶ that position is untenable for reasons we have already explained.¹⁷ There is likewise no merit to CTIA’s suggestion that explicit mechanisms like the FBM and the RM are unnecessary and offer no benefit over existing intrastate access charges as a means of network cost-recovery.¹⁸ The Commission and industry have long sought to establish more equitable mechanisms to recover network costs through

¹⁴ Verizon also suggests that the FBM may be unnecessary to the extent that some states might have created explicit funding mechanisms *without* reforming access charges. Comments of Verizon at 5-6. This is implausible. The relevant FBM funding is available only to help states “maintain affordable universal service in rural and high cost areas,” FBM at 5 & n.7, not to subsidize other types of state-level funds (or even the portions of such funds devoted to unrelated purposes), such as those that support telecommunications services for schools and libraries. It would be odd indeed for a state to create such explicit high-cost mechanisms while simultaneously maintaining or increasing implicit subsidies in access rates.

¹⁵ Comments of CTIA at 14-15.

¹⁶ Comments of CTIA at 8-9; Comments of Broadview et al. at 7; Comments of NCTA at 2.

¹⁷ See Reply Comments of the Missoula Plan Supporters at 20-22, CC Docket No. 01-92 (filed Feb. 1, 2007).

¹⁸ See Comments of CTIA at 8.

replacement of high usage-sensitive charges with explicit revenue mechanisms,¹⁹ and that is one of the basic purposes of the Missoula Plan itself.²⁰

The majority of commenters, however, appear to understand the need for an amendment like the FBM.²¹ Many, in fact, applaud the FBM as a sensible solution.²² While a few individual states have expressed concern that the mechanism does not fully account for their unique circumstances,²³ the FBM necessarily takes a big-picture approach to the early adopter problem and undeniably does justice in the overwhelming majority of cases. *See* Section II.B, *infra*. Regardless of any imperfections, the FBM remains the only realistic means of addressing the serious problem it is meant to address—much like the Missoula Plan itself.

¹⁹ *See* Further Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685, 4689 ¶ 8 n.20 (2005) (“Traditionally, rates for local telephone service in rural and high cost areas had been implicitly subsidized by charging high-volume long-distance callers and urban residents artificially higher rates. The 1996 Act recognized, however, that these implicit subsidies could not continue in a competitive marketplace and directed the Commission to create explicit universal service support mechanisms that are specific, predictable and sufficient.”).

²⁰ *See* Missoula Plan, Executive Summary at 1.

²¹ *See generally, e.g.*, Comments of Alexicon at 2; Comments of New Jersey Division of Rate Counsel at 3-4; Comments of New York at 3.

²² *See generally* Comments of Blackfoot Telecomm. Group; Comments of DuBois Telephone Exchange et al.; Comments of OPASTCO; Comments of GVNW Consulting; Comments of Minnesota Independent Coalition; Comments of Nebraska Rural Independent Companies; Comments of South Dakota Telecomm. Ass’n; Comments of Texas Statewide Telephone Coop.; Comments of USTelecom; Comments of the Western Telecomm. Alliance. In addition, even some commenters that have not fully endorsed the Missoula Plan have recognized that the FBM marks a significant improvement in the Plan’s development. *See* Comments of New York at 3; Comments of New Jersey Rate Counsel at 9.

²³ *See generally, e.g.*, Comments of New Jersey; Comments of Pennsylvania.

B. The FBM Is a Reasonable Solution to the Early Adopter Problem.

1. Many of the Challenges to the FBM Are Derivative of, and No More Persuasive Than, Previous Challenges to the Plan as a Whole.

Not surprisingly, almost every opponent of the FBM opposed the Missoula Plan itself.²⁴ And many of the critics simply echo their earlier, unfounded criticisms of the Plan as a whole. First, some critics repeat their position that the Commission lacks legal jurisdiction to implement comprehensive intercarrier compensation reform, and specifically for the one category of intercarrier compensation that most needs reform: intrastate access charges.²⁵ The Plan's supporters have already refuted the critics' jurisdictional objections, and repetition does not make those objections more persuasive.²⁶

Second, although some critics argue that the size of the FBM would burden consumers,²⁷ that argument, like the same critics' attack on the size of the RM in the previous comment round, is without merit. Neither the FBM nor the RM imposes new costs on consumers as a group. Instead, consumers will contribute to the Plan's funding mechanisms *instead of* paying the higher retail rates that result from bloated intercarrier compensation charges. And *consumers will come out ahead* as a result, because these cost-recovery mechanisms are more equitable and

²⁴ Cf. Comments of Alexicon at 2, (expressing support for the Missoula Plan generally but opposing the FBM).

²⁵ See, e.g., Comments of Broadview et al. at 4; Comments of New York at 3-4; Comments of Ohio at 2-4.

²⁶ See Reply Comments of the Missoula Plan Supporters at 25, CC Docket No. 01-92 (filed Feb. 1, 2007); Reply Comments of AT&T Inc. at 34-47, CC Docket No. 01-92 (filed Feb. 1, 2007).

²⁷ See, e.g., Comments of Alexicon at 4; Comments of Frontier at 3; Comments of New Jersey at 6-7.

sustainable than reliance on high rates for intercarrier compensation. We have discussed these issues at length in our comments on the Plan, and we will not repeat that discussion here.²⁸

Third, some commenters complain that the FBM, like the RM, will require carriers and consumers in low-cost areas to help cover a portion of network costs in high-cost areas in order to keep retail rates in those areas affordable.²⁹ But this is simply an attack on the federal government's longstanding commitment to reasonable rate comparability across the nation, and on universal connectivity goals more generally. Indeed, the Commission would act unlawfully if it *ignored* that commitment while undertaking intercarrier compensation reform.³⁰ And there is likewise no merit to related concerns that the "Low Rate Adjustment" will lead to unduly high SLCs for consumers in low-cost states.³¹ That modest adjustment applies to a carrier only to the extent the carrier has a revenue loss sufficient to trigger RM funding, which will not occur if existing SLC increases already exceed the access shift for that carrier or if access rates are already near the relevant targets in that jurisdiction.³²

Fourth, the critics also attack the FBM for its supposed lack of "portability."³³ But that complaint, too, is neither new nor persuasive. FBM dollars will be available to non-ILECs to the

²⁸ See Reply Comments of the Missoula Plan Supporters at 20-22, CC Docket No. 01-92 (filed Feb. 1, 2007).

²⁹ See, e.g., Comments of Frontier at 1-2; Comments of New Jersey at 7.

³⁰ See generally *Qwest Corp. v. FCC*, 258 F.3d 1191, 1204 (10th Cir. 2001).

³¹ See, e.g., Comments of New Jersey at 7-8. See also Comments of Broadview et al. at 6.

³² FBM at 6-7. In addition, if costs truly are low, carriers may not be competitively able to raise SLCs to the increased cap even where the Low Rate Adjustment applies.

³³ See, e.g., Comments of CTIA at 9, Comments of Sprint Nextel at 5; Comments of New Jersey at 5-6.

same extent as RM dollars.³⁴ Moreover, the critics' "non-portability" arguments are even more unpersuasive as a basis for opposing the *FBM* than as a basis for opposing the RM, because the portability issue does not even arise for large classes of FBM funding. In particular, all Category C funds, and a large portion of the Category B funds, do not go directly to carriers in the first place: they simply replace contributions to existing *state-level funding mechanisms*.³⁵

2. The Challenges to the FBM's Details Miss the Mark.

Even where opponents engage the FBM on its own terms, their arguments cast no doubt either on the need for some early adopter mechanism or on the basic features of the FBM itself. At most, those arguments suggest that the FBM could benefit from additional fine-tuning in the ongoing collaborative process with the state commissions.

Several commenters argue that the FBM is not sensitive enough to the details of state-by-state variation. For example, the Pennsylvania PUC argues that, although it has taken steps to reform intrastate rates, the FBM does not adequately account for its past regulatory choices.³⁶ Other commenters suggest that the FBM benchmarks should reflect the disparate sizes of local

³⁴ FBM at 3. As previously noted, the Plan's supporters diverge on the exact extent of the RM's availability to non-ILECs. Comments of the Missoula Plan Supporters, Attach. C at 3, CC Docket No. 01-92 (filed Oct. 25, 2006).

³⁵ FBM at 4-6. In part by ignoring that basic point, NASUCA grossly overstates the total cost of the FBM. See Comments of NASUCA at 12 (wrongly assuming that entire FBM is "portable"). In addition, NASUCA appears to overestimate the RM by similarly assuming the portability of RM dollars to wireless CETCs. *Id.* In fact, we estimate that total size of the FBM to be \$806 million. See FBM at 7. Some commenters attack the data analysis and impact assessment submitted in support of that figure. See, e.g., Comments of MACRUC at 4-5; Comments of New Jersey at 5-6; Comments of New York at 4. But the FBM filing makes clear that 31 states provided data through submitted questionnaires, and uses the "best available data" where questionnaires were lacking. FBM at 3; *id.*, table titled "Effects of Missoula Plan Restructure Mechanism and Federal Benchmark Mechanism" at 2.

³⁶ Comments of Pennsylvania at 3-4. See also Comments of Virginia at 10-11.

calling areas or various indicia of cost.³⁷ These concerns are not, however, a basis for rejecting the FBM. The architects of the FBM—the Plan’s supporters and various state commissions—accounted for basic types of variation in state-level intercarrier compensation reform. For example, the FBM includes several categories of funding, which accommodate the needs of (i) states that have implemented intercarrier compensation reform by raising end-user rates, (ii) states that have implemented such reform by adopting explicit funding mechanisms, and (iii) states that have undertaken some combination of those two approaches.³⁸ By distinguishing among these categories of states, the FBM does essential justice in the vast majority of cases. Although it may be appropriate to fine-tune the FBM still further, it would make no sense to reject the FBM (much less the Plan) simply because it does not account for every conceivable state-by-state variation.

Several commenters also challenge the particular values (\$20 and \$25) chosen for the low and high “benchmarks targets,”³⁹ but that challenge falls flat as well. As an initial matter, end user rates—along with the existence of explicit state-level funds—are the most meaningful criteria for identifying which states need federal funding to ensure fairness to early adopters in the administration of the RM and to help ensure reasonable comparability of rates from state to state. And *some* set of benchmarks is necessary to permit state-by-state comparisons. The \$20 and \$25 figures at issue here—chosen through an open and collaborative process involving Plan supporters and several state commissions—strike a reasonable balance between (i) achieving fairness to early adopter states and (ii) limiting the total size of the FBM. While the levels

³⁷ See, e.g., Comments of Frontier at 1-2.

³⁸ See FBM at 4-6.

³⁹ See, e.g., Comments of CTIA at 11-14; Comments of New Jersey at 5; Comments of New York at 4-5; Comments of Qwest at 4.

chosen might not satisfy every stakeholder, they are far from unreasonable. Indeed, the comments themselves—which variously attack the \$25 maximum benchmark as either too high or too low, depending on each party’s interests—suggest that this figure strikes a reasonable middle ground.⁴⁰ In any event, the FBM’s critics propose no better alternatives to these benchmarks. If and when they decide to engage this process constructively, the Missoula Plan participants would be more than willing to take their views into account in proposing any reasonable modifications to the current approach.

III. CONCLUSION

The Commission should promptly adopt the Federal Benchmark Mechanism—together with the Missoula Plan of which it is a necessary part.

Respectfully submitted,

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⁴⁰ Compare Comments of Pennsylvania at 4 (claiming \$25 benchmark is too high) with Comments of NCTA at 4 (claiming \$25 benchmark is too low); Comments of Qwest at 4 (same). In its comments, Qwest suggests a high benchmark of \$37, based on its own benchmark proposal. Comments of Qwest at 3. Qwest has arrived at this number based, in part, on its inclusion of business lines (which have higher average rates) along with residential lines. The FBM excludes business lines from the mechanism in order to control its total size.

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